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No. 82-304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

D. L. OSBORN, *et al.*,

Petitioners,

v.

CARL W. STOTTS, *et al.*, and
MEMPHIS FIRE DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-204

D. L. ORDERS, et al.,

Petitioners,

v.

CARL. W. STOTTS, et al., and
MEMPHIS FIRE DEPARTMENT, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the attempt of eleven proposed intervenors to delay and otherwise prevent the implementation of a consent decree, and whether the district court's opinion denying that intervention was an abuse of discretion.

On February 16, 1977, respondent Carl W. Stotts filed a class action lawsuit challenging the hiring and promotion policies of the City of Memphis Fire Department as racially discriminatory. Following three years of discovery and negotiations, the lawsuit was settled by the entry of a consent decree. The decree was preliminarily approved and subsequently posted for comment on April 25, 1980. Neither class members nor members of the firefighter's union, filed objections to the decree. On May 12, 1980, eleven non-minority firefighters filed a motion to intervene, objecting to the decree's minority promotion goals.

On May 16, 1980 the district court conducted a hearing to consider the motion to intervene. Following that hearing the court rejected the alternative remedial action proffered by the intervenors, and ruled that the decree was reasonable. Additionally, the court denied the motion to intervene on the ground that it was untimely.

The promotional provision objected to by the white firefighters is as follows:

> 8. Promotion: To insure as quickly as practicable the attainment of its long range goal, the City agrees to the following interim goals, subject to the availability of qualified applicants:
>
> (a) The City adopts the goal of promoting black applicants to positions above the rank of private or other entry level job classification in proportion to their representation in the qualified applicant pool for each uniformed rank or civil service classification. The parties agree to a goal of promoting blacks in the proportion of at least 20% for each civil service classification or uniformed rank as measured on an annual basis; the parties recognize that the number of blacks qualified for a particular job rank or classification may be a relevant factor in measuring the City's compliance with these goals. Nothing in this paragraph or Decree should be construed in such a way to require the promotion of the unqualified or the promotion of the less-qualified over the more qualified as determined by standards as set forth in the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 50.14.

Pet. App. 52-53[1/] [2/]

REASONS FOR DENYING THE WRIT

The judgment below affirmed the district court's denial of intervention by white firefighters objecting to a temporary promotional goal as part of a comprehensive consent decree entered into on May 17, 1980. The ruling below, therefore, presents the follow-

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1/ "Pet. App." refers to the separately presented appendix filed by the petitioners. The history of this litigation is also found in the companion case Stotts v. Memphis Fire Department, 679 F.2d 541, 546-560 (6th Cir, 1982).

2/ The long term goal of the Consent Decree is "to raise the black representation of each job classification in the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." Pet. App. 50-51. This is the same goal as contained in a 1974 consent decree between the City of Memphis and the United States Justice Department. Stotts, supra, 679 F.2d at 571. In 1979, blacks constituted between 33 and 37 percent of the Memphis population, yet the Fire Department was only 10 percent black and blacks were virtually excluded in supervisory ranks. See hiring and promotional data, 679 F.2d 550, 578-79.

ing question:

> Whether the district court abused its discretion in denying intervention by eleven white firefighters to attack a temporary promotional goal for black employees in the the Memphis Fire Department?

I. The Sixth Circuit's Holding Is Consistent with The Decisions of This Court and with The Decisions of Other Circuits.

The Court of Appeals has written an extensive opinion that fully considers all the factors weighed by the district court in denying intervention and approving the promotional goal as reasonable. This Court has denied review to white firefighters and their representatives seeking to intervene in remedial proceedings where goals were ordered for black employees. See, Commonwealth v. Rizzo, 530 F.2d 501 (3d Cir.), cert. denied sub. nom. Fire Officers Union v. Rizzo, 426 U.S. 921 (1976). Indeed, review has been denied in cases where similar promotional goals have been adopted as part of the reme-

dial scheme in correcting past discrimination in municipal fire departments. See Firefighters Institute v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), cert. denied sub. nom., City of St. Louis v. United States, 452 U.S. 938 (1981) (promotion ratio of one black firefighter for each two white firefighters); Firebird Society v. Bd. of Fire Commissioners, 66 F.R.D. 457 (D. Conn.), aff'd, 515 F.2d 504 (2nd Cir.), cert. denied, 432 U.S. 867 (1975) (7 of 28 lieutenant positions were designated for blacks). White intervenors and/or employee unions participated in the liability and remedy stages of litigation in both of these cases and were unable to provide alternatives to numerical goals.

Petitioners also argue that the promotional goal conflicts with this Court's ruling in United Steelworkers v. Weber, 443 U.S. 193 (1979), because it necessarily infringes upon

the promotional opportunities of white employees. This argument is unpersuasive in that post-Weber voluntary affirmative action programs in cities with significant minority populations have been approved by appellate courts and review has been denied by this Court. Detroit Police Officers Assoc. v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); Talbert v. Richmond, 648 F.2d 925 (4th Cir. 1981), cert. denied, 50 U.S.L.W. 3547 (January 11, 1982).[3/]

3/ The district court and the court of appeals fully considered the Weber standards and determined that the decree was proper:

> The decree was reasonably related to correcting the underutilization of minorities in the Memphis Fire Department. The decree did not require the discharge of non-minority employees and only encompassed qualified minorities. Moreover, the decree is temporary and does not constitute an absolute bar to the advancement of non-minorities. More importantly, the court has retained jurisdiction to effectuate the purposes of the decree while not unduly trammeling the interests of

Clearly the district court did not abuse its discretion in denying intervention to whites who challenge a reasonable consent decree that comports with standards approved by this Court and the lower circuits for voluntary affirmative action.

Moreover the district court here neither erroneously denied nor abused its discretion in denying the petitioners' motion to intervene. Philadelphia Elec. Co. v. Westinghouse

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3/ continued

of non-minorities.

679 F.2d at 556.

Between July 1980 and June 1982, 72 promotions were made in the Fire Department with only 4 promotions received by blacks because the promotional register was depleted of qualified blacks at that time. On June 29, 1982, the district court ordered the Fire Department to promote the First black to the rank of deputy chief and one black to district chief in addition to 7 other black promotions. Pet. App. 89-94. A total of 33 promotions were made as a result of that order with 9 awarded to blacks. For the two year period from July 1980 to July 1982, therefore, blacks received 13 of 105 promotions or 12.4%.

Elec. Corp., 308 F.2d 865, 861 (3rd Cir. 1962), cert. denied, 372 U.S. 936; Korioth v. Briscoe, 523 F.2d 1271, 1278 n. 24 (5th Cir. 1975); Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir. 1969); FMC Corp. v. Keizer Equip. Co., 433 F.2d 654 (6th Cir. 1970); Union Cent. Life Ins. Co. v. Hamilton Steel Prods. Inc., 374 F.2d 820, 824 (7th Cir. 1967); Mendenhall v. Allen, 346 F.2d 326, 328 (7th Cir. 1965); Edmondson v. State of Nebraska, 383 F.2d 123, 128 (8th Cir. 1967); Hawaii-Pacific Venture Capital Corp. v. Rothbard, 564 F.2d 1343 (9th Cir. 1977); Farmland Irrigation Co. v. Dolplmaier, 220 F.2d 247 (9th Cir. 1955); Reich v. Webb, 336 F.2d 1353 (9th Cir. 1964), cert. denied, 380 U.S. 915. See also, Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 142 (1944); Woburn Decreasing Co. of New Jersey v. Spencer Kellogg & Sons, Inc., 3 F.R.D. 7, 10 (W.D.N.Y. 1943).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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